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In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT FLANAGAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether a pretrial order disqualifying defense counsel in a criminal case is immediately appealable.

2. Whether the district court possessed and properly exercised the power to disqualify counsel jointly representing all four petitioners on the basis of its finding that there existed serious potential conflicts of interest among them, notwithstanding their attempted waiver of their right to conflict-free representation.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is reported at 679 F.2d 1072.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1982 (Pet. App. A32-A33), and a petition for rehearing was denied on July 12, 1982 (Pet. App. A34-A35). The petition for a writ of certiorari was filed on September 1, 1982, and was granted on January 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). There is a substantial question regarding the jurisdiction of the court of appeals, and therefore of this Court, which is fully discussed in the argument section of this brief.

CONSTITUTIONAL PROVISIONS AND RULE OF PROCEDURE INVOLVED

Applicable provisions of the Fifth and Sixth Amendments to the United States Constitution are set out at

Pet. 3. Fed. R. Crim. P. 44(c) provides, in pertinent part:

> Whenever two or more defendants have been jointly charged * * * or have been joined for trial * * *, and are represented by the same retained or assigned counsel * * *, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT

Petitioners are police officers in the Philadelphia Police Department, where they were members of a so-called "grandpop" squad. Petitioner Flanagan, "posing as an aged derelict," served as a decoy to attract street criminals (J.A. A16). The remaining petitioners hid out of view until Flanagan gave the standard alarm, "give me back my money," at which time they would move in and make an arrest (J.A. A16-A17).

On September 10, 1981, a federal grand jury sitting in the Eastern District of Pennsylvania returned a 13-count indictment against petitioners. Count I charged all petitioners with conspiring to violate the civil rights of citizens, in violation of 18 U.S.C. 241 (J.A. A4-A9). The succeeding counts charged petitioners, in varying combinations, with substantive civil rights offenses, in violation of 18 U.S.C. 242 (J.A. A9-A14).[1] The indictment alleged that, in the course of their activities on the grandpop squad, pe-

[1] Petitioners Flanagan and McNamee were charged in all 12 substantive counts, Landis in 11 substantive counts, and Keweshan in 10 substantive counts (J.A. A9-A14).

titioners had conspired to arrest persons without probable cause and had illegally arrested or physically abused eight people (J.A. A4-A14).

1. Following arraignment, petitioners, through counsel Sprague & Rubenstone, filed a number of pretrial motions, including a motion by petitioner Flanagan's three co-defendants to sever their case from his (J.A. A15-A18). They claimed that from their places of hiding they were "not privileged" to what occurred between Flanagan and the supposed street criminal prior to receiving the signal for assistance, that the "vast majority" of the government's evidence—of which they claim little or no knowledge—related to what transpired between Flanagan and the various individuals arrested, and that, given the "gross disparity" in the quantum of inculpatory evidence, severance was required to protect them against prejudicial spillover (J.A. A17-A18, A20). In response, the government answered petitioners' allegations and moved for a hearing under Rule 44(c) of the Federal Rules of Criminal Procedure regarding Sprague & Rubenstone's multiple representation of petitioners.

At the conclusion of the Rule 44(c) hearing, and following the completion of supplementary briefing requested by the court, the district court disqualified Sprague & Rubenstone from representing any of the petitioners. The court's ruling was not based on the inherent evils of multiple representation, but rather on the particular facts of this case, especially as reflected in petitioners' own pretrial motions and supporting memoranda. Disqualification was required, the court concluded, because the "potential for conflict here is overwhelming" (Pet. App. A18).[2]

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[2] As the court stated at the hearing (Pet. App. A40): "The potential for conflict just jumps out in this case and I just don't know how counsel could even undertake, under the cir-

The court first noted that the four petitioners were not all charged in each count of the indictment, reflecting that the involvement of each "may vary significantly from that of the others" (Pet. App. A16-A17). Indeed, the court observed that petitioners had moved to dismiss the conspiracy count against them on the ground that, because of the differences in each petitioner's role in the particular arrests, there was no single conspiracy and each allegedly illegal arrest must have been the product of a separate agreement (*id.* at A17-A18).

In addition, the court noted that defense counsel had acknowledged that this was a complex case, likely to turn on circumstantial evidence relating to each petitioner's state of mind, and that oral statements made by petitioners will be essential to prove their requisite state of mind. This factor alone, the court reasoned, created a serious potential conflict of interest because "joint counsel's obligation to preserve the confidences of one defendant could severely hamper the cross-examination of any hearsay witness as to another defendant" (Pet. App. A18).

The court concluded that "[t]he most glaring evidence of the potential for conflict which may arise if all defendants are represented jointly is found in defendants Keweshan, Landis and McNamee's motion for severance, and the accompanying memorandum of law" (Pet. App. A18). There, the court noted, those three petitioners claimed that they would be "severely prejudiced" if they were tried together with petitioner Flanagan, because it was upon Flanagan's information and signal that they relied in making arrests (Pet. App. A19-A20). The court reasoned that joint representation would gravely prejudice petitioners'

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cumstances, to attempt to represent all four of these defendants." See also *id.* at A55, A59, A68, A74.

interests because of "joint counsel's possible inability to distance Keweshan, Landis and McNamee from Flanagan" (Pet. App. A20).[3]

Notwithstanding the serious difficulties posed by joint representation in this case, the district court found that each petitioner had voluntarily, knowingly, and intelligently decided to waive all objections to joint representation (Pet. App. A16, A20).[4] The court therefore addressed a question it had requested the parties to brief following the Rule 44(c) hearing: whether it possessed the authority to require separate counsel notwithstanding petitioners' waivers of their right to separate counsel (Pet. App. A16). The court concluded that it had such authority.

The court noted that the established standards of the legal profession prohibit a lawyer's representa-

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[3] The district court also discussed other ways in which a conflict of interest could arise in this case: (1) inability of counsel during opening and closing statements to set one defendant apart from the others; (2) inability of counsel to argue the relative culpability of the defendants at sentencing; (3) the possibility that the jury might infer from the joint representation that if one defendant is guilty, the others are as well; (4) the possibility that, if the government introduces more evidence against petitioner Flanagan than the other three, counsel will unduly concentrate his efforts on defense of Flanagan; and (5) problems arising if the government offers only one defendant immunity in exchange for his testimony, or if some but not all of the petitioners choose to testify or to introduce character or reputation evidence (Pet. App. A14-A15).

[4] During the course of the Rule 44(c) hearing, petitioners disclosed that their legal expenses were being paid by the Fraternal Order of Police (Pet. App. A49, A54, A59, A64). The court thereafter informed petitioners that separate counsel would, if necessary, be appointed at public expense, and petitioners acknowledged that they were aware of such a possibility (*ibid.*). Accordingly, the district court found that petitioners' waiver of conflict-free counsel was made "without financial pressure" (Pet. App. A16).

tion of multiple criminal defendants—even where the clients consent—unless it is "obvious that he can adequately represent the interest of each" and it is "clear that no conflict is likely to develop" (Pet. App. A23-A24, A26, quoting Model Code of Professional Responsibility DR 5-105(C) (1980), and Standards Relating to the Defense Function § 3.5(b) (1980)). The district court stressed that not only does an attorney's representation of conflicting interests violate professional ethics, it also " 'invites disrespect for the integrity of the court' " and is " 'detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court' " (Pet. App. A24, quoting *United States* v. *Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978)).

The court rejected petitioners' contention that counsel may be disqualified only when an "actual" conflict of interest is found (Pet. App. A24-A25). Rather, it observed (*id.* at A25) that, by the terms of Fed. R. Crim. P. 44(c), it was required to take appropriate action in advance of trial "[u]nless it appears that there is good cause to believe no conflict of interest is likely to arise." And, while the court ruled that disqualification of a defendant's chosen counsel would be inappropriate if the potential for a conflict of interest were a matter of "mere speculation," it held that it had the discretion to anticipate the conflict and disqualify counsel "where the likelihood is great that a potential conflict may escalate into an actual conflict" (Pet. App. A27). The district court therefore issued an order disqualifying Sprague & Rubenstone from representing any of the four petitioners.[5]

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[5] The court disqualified the firm from representing any of the four petitioners in reliance on the well-settled presumption

2. The court of appeals affirmed (Pet. App. A1-A11). The court noted that the district court's disqualification order was entered pursuant to Fed. R. Crim. P. 44(c), and that to reverse the order it would "have to find either that there is good cause to believe that no conflict of interest is likely to arise, or that the measures taken were an abuse of discretion" (Pet. App. A5-A6). It found neither.

Like the district court, the court of appeals analyzed petitioners' pretrial pleadings as well as the likely course of the pending trial in surveying the conflicts of interest that would arise from Sprague & Rubenstone's joint representation of petitioners. The court pointed out that petitioners had moved to dismiss the conspiracy count because of their differing involvement in the substantive counts and noted that three of the petitioners had requested a severance from petitioner Flanagan because of the "prejudice [that] would arise if they were forced to stand trial with him" (Pet. App. A6). The court concluded that these factors, as well as others, "indicate conflicts that joint defense counsel will very likely face in presenting an adequate defense for each defendant" (*ibid.*), and fully justify the district court's order. While a "defendant's choice of counsel is not to be dealt with lightly or arbitrarily" and "should not be interfered with in cases where potential conflicts of interest are highly speculative," where "the materialization of actual conflict is very likely, disqualification of defense counsel and ordering defendants to retain separate counsel are appropriate measures to be taken

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that privileged information had been acquired from each petitioner in the course of the attorney-client relationships. In these circumstances, the court concluded, allowing Sprague & Rubenstone to represent one of the petitioners would be unfair to the other three. See Pet. App. A16 n.1(a).

pursuant to Fed. R. Crim. P. 44(c)" (Pet. App. A10).[6]

The court held that neither the Sixth Amendment right to assistance of counsel nor petitioners' ability to waive their right to conflict-free counsel altered the above conclusion. The Constitution, the court reasoned, does not provide defendants with an absolute right to the lawyer of their choice (Pet. App. A8). And, while petitioners undoubtedly possess the right to separate representation free from potential conflicts of interest, it does not follow that by waiving that right they are absolutely entitled to representation by counsel burdened with a conflict (*id.* at A8-A9).[7] The court noted that the judiciary has an interest independent of that of a criminal defendant in maintaining respect for the integrity of trial court

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[6] The court held that the district court did not err in preventing Sprague & Rubenstone from representing any one of the petitioners (Pet. App. A11). While complete disqualification may not be required in every case in which a conflict is likely to arise, the court found that the question was committed to the sound discretion of the district court under Fed. R. Crim. P. 44(c). The court concluded that the district court had not abused that discretion by ordering complete disqualification in this case because of the significant potential for conflict in the firm's receipt of confidential information from each of the petitioners, which might be used in the course of defending one to the detriment of the others (Pet. App. A11).

[7] The government had urged in the court of appeals, as an alternative ground supporting the judgment, that petitioners' waivers of conflict-free counsel were not intelligent and knowing. Although the court of appeals noted that the trial court had questioned whether the law firm was even in a position to advise the defendants fully concerning the possible conflicts of interest in this case (Pet. App. A10), it declined to address the government's alternative argument because it affirmed the district court's conclusion that, in the circumstances of this case, disqualification of counsel was proper notwithstanding petitioners' possible waiver.

proceedings, which extends to preventing a serious breach of professional ethics (*id.* at A9-A10). Because petitioners did not even dispute that a conflict of interest was very likely to arise in this case (*id.* at A10; see also *id.* at A6), the court of appeals concluded that the district court did not err in requiring separate counsel.[8]

SUMMARY OF ARGUMENT

1. The district court's disqualification order is not appealable prior to trial. The jurisdiction of the courts of appeals is limited to "final decisions of the district courts" (28 U.S.C. 1291), and a disqualification order in a criminal case does not fall within that small category of "collateral orders" that, notwithstanding their interlocutory nature, require pretrial appellate review. This Court has generally been cautious in delineating the reach of the collateral order doctrine, especially in the case of attempted pretrial appeals by criminal defendants, which jeopardize the substantial public interest in the speedy resolution of criminal charges. See *Barker* v. *Wingo*, 407 U.S. 514, 519-521 (1972). Indeed, interlocutory appeals by criminal defendants have been found to be appropriate in only the most pressing circumstances: where, among other things, denial of such review would violate a constitutional right "not to be tried" (*Abney* v. *United States*, 431 U.S. 651 (1977); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979)), or where denial of immediate review would render impossible any review whatsoever of a matter entirely collateral to the trial itself (*Stack* v. *Boyle*, 342 U.S. 1 (1951)). Orders

[8] The court of appeals stayed its mandate to and including September 19, 1982, to permit the filing of a petition for a writ of certiorari. We have been informed by the United States Attorney that no trial date has been set pending this Court's disposition of the case.

disqualifying defense counsel meet none of these established criteria.

Petitioners' asserted right to be represented by counsel of their choice, whether grounded on the Sixth Amendment's Assistance of Counsel Clause or the Fifth Amendment's Due Process Clause, does not embody a "right not to be tried" in the absence of desired counsel. Although the Sixth Amendment provides a defendant with a number of discrete rights, there is no textual indication on the face of the Amendment that the full enjoyment of those rights requires interlocutory appellate oversight. See *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978). The same is true of any possible due process claim to counsel of choice. An asserted denial of due process "is simply not [a right] that must be upheld prior to trial if it is to be enjoyed at all." *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (June 28, 1982), slip op. 6 (footnote omitted).

A disqualification order, moreover, unlike an order regarding bail (*Stack* v. *Boyle*, *supra*), does not become moot upon final judgment. Such an order can be effectively reviewed by an appellate court following final judgment and, in the same manner as a multitude of other trial court rulings, may provide the basis for a reversal and retrial should a defendant show that an erroneous disqualification prejudiced his defense.

Finally, there are compelling doctrinal and prudential considerations that militate against interlocutory appeal of the order in this case. The "collateral order" doctrine, as originally conceived, extended only to that "small class" of important interlocutory orders that were completely separable from the merits of pending litigation. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). A disqualification order, however, cannot "be reviewed

without halting the main trial" (*Stack* v. *Boyle*, 342 U.S. at 12 (opinion of Jackson, J.)). This interlocutory review, furthermore, requires searching consideration of the merits of the criminal prosecution: the appellate court's review in this case, for example, depended upon the petitioners' own pretrial pleadings regarding the validity of their indictment and the propriety of a joint trial. Such expansion of the *Cohen* doctrine beyond truly collateral matters cannot be justified simply on the ground that the right asserted by petitioners is "important." Should the Court conclude that the relative value of the right asserted by petitioners is great enough to warrant interlocutory review, "numerous other questions would fall under such [an analysis], and the policy against piecemeal appeal in criminal cases would be swallowed by ever-multiplying exceptions." *Hollywood Motor Car Co.*, slip op. 7. Rather than begin down that slippery slope, the Court should adhere to traditional notions of finality, which include the possibility of mandamus in appropriate cases. Finality is more than a mere "technical concept"; it is also "the means for achieving a healthy legal system." *Cobbledick* v. *United States*, 309 U.S. 323, 326 (1940).

2. If the Court concludes that pretrial disqualification orders are immediately appealable, it should affirm the decision of the court of appeals. Contrary to petitioners' assumption, the Sixth Amendment does not guarantee a defendant the right to the services of a particular lawyer. Rather, the dictates of the Assistance of Counsel Clause are satisfied so long as a defendant receives the effective assistance of some attorney. *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 12; *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). To the extent that the Constitution grants a defendant the right to demand representation by a specific attorney, a more arguable

doctrinal source of that right would be the Due Process Clause, not the Sixth Amendment. But, whatever the foundation for petitioners' claimed right to counsel of choice, that right is plainly not absolute—the Constitution, at most, proscribes arbitrary or unreasonable interference with a defendant's selection of counsel. *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

Every court of appeals has expressly held, and the decisions of this Court clearly demonstrate, that any right to counsel of choice is not absolute. For example, a trial court has discretion to deny a continuance—even when such a course of action will interfere with a defendant's desire to be represented by a particular attorney. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964). The courts have also consistently held that an indigent is not entitled to the appointment of a particular attorney, nor can a defendant be represented by a layman. Similarly, a defendant has no absolute right to insist on being represented by a lawyer who is not admitted to practice before the court conducting his trial or hearing his appeal. But most importantly, it has been repeatedly recognized that a defendant may not insist upon the services of a particular lawyer where such representation would be contrary to established norms of professional legal conduct. See *United States* v. *Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

While there is no flat prohibition on multiple representation of defendants in criminal cases, this Court has recognized for decades the inherent evils of multiple representation. *Glasser* v. *United States*, 315 U.S. 60 (1942). And, as described and analyzed by numerous legal scholars and commentators, the dangers of such joint representation are both ubiquitous and insidious. Accordingly, some experts have called for a complete ban on joint representation in criminal

cases, See, *e.g.*, Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 157-162 (1978). Although the organized bar has not yet taken a stance as strict as that just suggested, it has proscribed joint representation unless "it is obvious that [the lawyer] can adequately represent the interest of each [client]" and it is "clear that no conflict is likely to develop" (Model Code of Professional Responsibility DR 5-105 (C) (1980); Standards Relating to the Defense Function § 3.5(b) (1980)).

The district court and court of appeals, after applying the ABA standards set out above, correctly concluded that Sprague & Rubenstone's continued multiple representation of petitioners would violate established ethical norms. Pretrial pleadings drafted by counsel expressly rely on the differing interests of petitioners in requesting modification of the indictment and a severance, and plainly demonstrate that petitioners' interests have "diverge[d] [not only] with respect to a material factual or legal issue," but also as to "a course of action." *Cuyler* v. *Sullivan*, 446 U.S. 335, 356 n.3 (1980) (opinion of Marshall, J.). In these circumstances, the conflicts that inhere in Sprague & Rubenstone's joint representation of petitioners are more than mere speculation, and the disqualification order entered was fully justified. See Rule 44(c) Advisory Committee Note, 77 F.R.D. 594, 600-603 (1978).

Petitioners' undoubted entitlement to present a common defense does not alter the propriety of the disqualification order in this case. The decision below does not impugn petitioners' right to present a common defense; it merely insures that any decision to

do so is untainted by conflicts of interest. Similarly, the fact that a waiver of the right to conflict-free counsel might be effective to bar a subsequent ineffective assistance of counsel claim does not establish an affirmative right to insist that the trial court countenance professional conduct falling below accepted ethical norms. While petitioners may abjure their own rights to separate counsel, they cannot "waive" the strong and independent public interest in the fairness of criminal trials and the integrity of the legal profession.

ARGUMENT

I. A PRETRIAL ORDER DISQUALIFYING DEFENSE COUNSEL IN A CRIMINAL CASE IS NOT AN IMMEDIATELY APPEALABLE "FINAL DECISION" WITHIN THE MEANING OF 28 U.S.C. 1291

Congress has limited the jurisdiction of the courts of appeals to "final decisions of the district courts." 28 U.S.C. 1291. In the context of a criminal prosecution, the statute contemplates appellate review only following conviction and the imposition of sentence. See *United States* v. *Hollywood Motor Car Co.*, No. 81-1144 (June 28, 1982), slip op. 2.[9] A narrow exception to the final judgment rule, however, permits interlocutory appellate review of so-called "collateral orders." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). To qualify, such an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)

[9] "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U.S. 211, 212 (1937).

(footnote omitted); *Hollwood Motor Car Co.*, slip op. 2. We submit that the disqualification order entered by the district court does not fall within the "collateral order" exception.[10] If the Court agrees, the appropriate course is to vacate the judgment of the court of appeals and remand with instructions to dismiss the appeal.[11] See, *e.g.*, *Hollywood Motor Car Co.*,

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[10] The courts of appeals are divided on the question whether a pretrial order disqualifying defense counsel in a criminal case is immediately appealable. Six circuits have held such orders to be immediately appealable, although generally without any substantial analysis of the issue. *United States* v. *Curcio*, 694 F.2d 14, 19-20 (2d Cir. 1982) (recognizing that "the point is not free from difficulty," but adhering to a pre-*Hollywood Motor Car Co.* Second Circuit opinion that, without discussion, held such orders appealable); *United States* v. *Dolan*, 570 F.2d 1177, 1180 n.3 (3d Cir. 1978); *United States* v. *Garcia*, 517 F.2d 272, 275 (5th Cir. 1975); *United States* v. *Phillips*, 699 F.2d 798, 801 (6th Cir. 1983); *United States* v. *Agosto*, 675 F.2d 965, 968 n.1 (8th Cir.), cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982); *United States* v. *Hobson*, 672 F.2d 825, 826 (11th Cir.), cert. denied, No. 82-57 (Oct. 12, 1982). See also *United States* v. *Smith*, 653 F.2d 126 (4th Cir. 1981) (entertaining pretrial appeal; appealability issue not addressed). The Ninth Circuit has held that such orders are not immediately appealable. *United States* v. *Greger*, 657 F.2d 1109, 1110-1113 (1981), cert. denied, No. 81-1357 (May 2, 1983).

[11] Unless the district court's order disqualifying counsel is held appealable, this Court lacks jurisdiction to reach the merits. 28 U.S.C. 1254(1); *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 9-11; *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974). Because appealability is a jurisdictional matter, the Court should address it even though it was not argued by the parties before the court of appeals. See, *e.g.*, *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 209 (1963); *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U.S. 449, 451-452 (1935). See generally R. Stern & E. Gressman, *Supreme Court Practice* 459 (5th ed. 1978). In the

slip op. 7; *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379-380 (1981).[12]

A. Interlocutory Appeals Have Been Found Appropriate In Only A Few Discrete And Strictly Limited Categories Of Criminal Cases

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). Just last Term, the Court noted that "the policy of Congress embodied in [28 U.S.C. 1291] is inimical to piecemeal appellate review." *Hollywood Motor Car Co.*, slip op. 2. This policy, moreover, "is at its strongest in the field of criminal law." *Ibid.* " 'The general principle of federal appellate jurisdiction, derived from the common law and enacted by the First Congress, requires that review of *nisi prius* proceedings await their termination by final judgment * * *. This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.' " *Ibid.*, quoting *DiBella* v. *United States*, 369 U.S. 121, 124 (1962). Indeed, because "encouragement of delay is fatal to the vindication of the criminal law" (*Cobbledick*, 309 U.S. at 325), the Court has been loath to create exceptions to the finality requirement of 28 U.S.C. 1291: "Bearing the discomfiture and cost of a prosecution for crime

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instant case, the court of appeals raised the issue of appealability sua sponte. Pet. App. A5 n.1.

[12] In *Firestone Tire*, the Court held that orders *denying* motions to disqualify counsel in *civil* cases are not immediately appealable. The Court took no position on whether orders granting motions to disqualify counsel in civil cases would be appealable under 28 U.S.C. 1291, nor did it express any view regarding the appealability of such orders in criminal cases. 449 U.S. at 372 n.8.

even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick*, 309 U.S. at 325-326.

Despite the possible severity of 28 U.S.C. 1291's finality requirement in particular cases, the wisdom of insisting upon a final judgment prior to the invocation of appellate review in the vast majority of criminal prosecutions becomes obvious upon even perfunctory analysis. Every federal criminal prosecution presents a multitude of questions requiring resolution by the trial court. Does the indictment state an offense? Is the statute constitutional on its face or as applied to the defendant's conduct? Is particular evidence admissible? Has the accused voluntarily waived one or more of his procedural or constitutional rights? The answers to these or other questions—any one of which may involve important constitutional issues—will undoubtedly impact the ultimate course of the litigation, in some cases decisively. But if each important constitutional question were resolved in a separate appeal before trial, litigation could be interminable. There is a compelling societal interest both in the swift punishment of the guilty and in the prompt exoneration of the innocent. See *Barker* v. *Wingo*, 407 U.S. 514, 519-521 (1972). The aphorism that "justice delayed is justice denied" applies with special force to criminal cases.

In recognition of the above considerations, Congress has specifically provided for only a few, strictly limited exceptions to the final judgment rule,[13] and this

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[13] There are two principal express statutory exceptions to the final judgment requirement. First, 28 U.S.C. 1292(b) allows interlocutory appeals in civil cases by permission of the district

Court has consistently refused to countenance interlocutory appeals by criminal defendants except in a very few situations in which, among other things, the damage to the right assertedly denied by the trial court's order would be irreparable in the absence of an interlocutory appeal. The Court, in fact, has departed from the final judgment rule only where "denial of immediate review would render impossible any review whatsoever" (*United States* v. *Ryan*, 402 U.S. 530, 533 (1971)) because " 'the legal and practical value of [the asserted right] would be destroyed if it were not vindicated before trial.' " *Hollywood Motor*

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court and the court of appeals, but only where resolution of a controlling question of law may materially advance the ultimate termination of the litigation. Significant for present purposes is that Congress elected to exclude criminal cases from Section 1292(b).

Second, Congress has in recent years adopted a liberal attitude toward allowance of interlocutory *prosecution* appeals in criminal cases (*e.g.*, 18 U.S.C. 2518(10)(b) and 3731). The reasons for this policy are evident. Because of the operation of double jeopardy principles, erroneous pretrial rulings adverse to the government will almost always be unreviewable following final judgment. In addition, institutional constraints (including the requirement that any government appeal be authorized by the Solicitor General) greatly reduce the risk of frivolous appeals or appeals taken for the purpose of delay. Indeed, both provisions cited above require the United States Attorney to certify that the appeal is not being "taken for purposes of delay" and mandate that the appeal be "diligently prosecuted." None of the considerations that support allowance of interlocutory prosecution appeals has force in the vast majority of potential defense interlocutory appeals, and it is therefore not surprising that, except in the purely collateral area of bail (18 U.S.C. 3147(b)), Congress has never expressly authorized interlocutory appeals by criminal defendants. Cf. *Barker* v. *Wingo*, 407 U.S. at 521 (recognizing the greater incentives defendants generally have to seek to delay criminal trials).

Car Co., slip op. 3-4, quoting *United States* v. *MacDonald*, 435 U.S. 850, 860 (1978). There have been only three such occasions.

In *Stack* v. *Boyle*, 342 U.S. 1 (1951), the Court held that a pretrial order denying a motion to reduce bail is immediately appealable because meaningful review of the order setting bail cannot be postponed until appeal from final judgment.[14] At that late date, there would be no effective remedy if an appellate court determined that bail had been denied improperly at the trial and pretrial stages of the case. 342 U.S. at 12 (opinion of Jackson, J.).[15]

In *Abney* v. *United States*, 431 U.S. 651 (1977), and *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), the Court held that pretrial orders denying motions to dismiss on double jeopardy and Speech or Debate Clause grounds are immediately appealable under 28 U.S.C. 1291. In each case, the Court emphasized that the express language of the Constitution creates a "right not to be tried," which must be upheld prior to trial if it is to be enjoyed at all. See *Hollywood Motor Car Co.*, slip op. 4; *MacDonald*, 435 U.S. at 861.

Thus, in *Abney* the Court concluded (431 U.S. at 661-662) that the language of the Double Jeopardy Clause protects a defendant not only against being convicted of an offense after a previous conviction or acquittal for the same offense, but also against being "twice put in jeopardy," *i.e.*, being twice put to trial

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[14] See 18 U.S.C. 3147(b) (embodying holding of *Stack* v. *Boyle*).

[15] A pretrial order with respect to bail, moreover, is truly "collateral" to the criminal prosecution. Unlike most other rulings entered during the course of a criminal proceeding, "an order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried" (*Stack* v. *Boyle*, 342 U.S. at 12 (opinion of Jackson, J.)).

for the same offense. Postponing review until final judgment would expose the defendant to a second trial—a principal evil the Double Jeopardy Clause was intended to prevent.[16]

In *Helstoski*, the Court found that a Congressman was entitled to an interlocutory appeal to assert his Speech or Debate Clause privilege in a criminal case. As with the Double Jeopardy Clause, the Court held that the Speech or Debate Clause is intended to prevent not just conviction, but the very questioning of a Congressman at a criminal trial about his legislative acts. Accordingly, because the Clause grants the right—grounded in separation of powers principles—not even to be questioned regarding legislative acts at a criminal trial, the "right protected by the Clause would [be] lost if the appeal [were] postponed." *Hollywood Motor Car Co.*, slip op. 3. See generally *United States* v. *Brewster*, 408 U.S. 501, 505 (1972); *United States* v. *Johnson*, 383 U.S. 169, 173 (1966).

Under the decisions of this Court, therefore, one of the prerequisites for interlocutory appeal of an order in a criminal case is a showing that to delay review until final judgment will foreclose any effective protection of an important right or vitiate a "right not to be tried" that is the essence of a specific constitutional provision. See *MacDonald*, 435 U.S. at 861. An order is not immediately appealable merely because all the facts relevant to its correctness have

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[16] The Court also emphasized the collateral nature of the double jeopardy claim asserted in *Abney*. The Court noted that the particular double jeopardy claim before it was immediately appealable because the "defendant makes no challenge whatsover to the merits of the charge against him," and the "elements of that claim are completely independent of his guilt or innocence" (431 U.S. at 659, 660). Therefore, the double jeopardy claim in *Abney* was "truly collateral to the criminal prosecution itself" (*id.* at 660).

been fully developed,[17] because an immediate appeal would avoid a substantial burden on the defendant,[18] or because interlocutory review " 'will necessarily determine the conduct of the trial and may vitally affect the result.' " *DiBella*, 369 U.S. at 127, quoting *Cogen* v. *United States*, 278 U.S. 221, 223 (1929) (both holding denials of pretrial suppression motions to be nonappealable).[19] Rather, because of the overriding need to avoid delay in criminal proceedings, the validity of the trial court's rulings—even on constitutional claims—must await conviction before " 'reconsideration by an appellate tribunal.' " *Hollywood Motor Car*

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[17] For example, an order denying a motion to dismiss an indictment on grounds of vindictive prosecution is not appealable prior to final judgment, even though no further facts remain to be developed at trial. See *Hollywood Motor Car Co.*, slip op. 3 (Blackmun., J., dissenting). See also *Abney*, 431 U.S. at 663 (no pretrial review of an order denying a motion to dismiss an indictment for failure to state an offense); *Heike* v. *United States*, 217 U.S. 423, 430-431 (1910) (no pretrial review of an order rejecting a defendant's claim of statutory immunity from prosecution).

[18] See, *e.g.*, *Cobbledick*, 309 U.S. at 326 (order denying motion to quash subpoena duces tecum is not immediately appealable; "the requirement of finality will be enforced not only against a party to the litigation but against a witness who is a stranger to the main proceeding"); *United States* v. *Ryan*, 402 U.S. at 532-534 (denial of motion to quash subpoena duces tecum is not immediately appealable simply because compliance with the subpoena will impose a substantial burden on respondent; interlocutory review is available "[o]nly in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims").

[19] See also *MacDonald*, 435 U.S. at 863 (no pretrial review of an order denying a motion to dismiss the indictment under the Sixth Amendment's Speedy Trial guarantee); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 29-31 (1943) (no pretrial review of an order refusing to dismiss an indictment for lack of jurisdiction).

Co., slip op. 6 n.2, quoting *Cobbledick*, 309 U.S. at 326. We turn now to the appealability of the instant order.

B. Orders Disqualifying Defense Counsel In Criminal Cases Do Not Meet The Strict Standards Justifying Interlocutory Review

Petitioners claim that the Constitution guarantees them the right to be represented by a particular lawyer of their choice, notwithstanding the fact that such representation may be contrary to established norms of professional legal conduct. See Model Code of Professional Responsibility DR 5-105(C) (1980); Model Rules of Professional Conduct Rule 1.7 (52 U.S.L.W. 1, 7 (Aug. 16, 1983)). As we explain in Part II of this Brief, no decision of this Court has ever recognized such a sweeping right—the Constitution, at most, protects against arbitrary interference with a defendant's selection of counsel. But, even assuming that petitioners' right to counsel is as expansive as they assert, the district court's ruling in this case does not demand immediate appellate attention. An order disqualifying defense counsel in a criminal case does not infringe a "right not to be tried," nor is such an order wholly immune from effective appellate review after final judgment. Such an order, moreover, is hardly "collateral" to the merits of the prosecution—a compelling reason not to depart from traditional considerations of finality. Interlocutory appeal in the circumstances of this case, therefore, is plainly inappropriate.

1. *There is no "right not to be tried" in the absence of the services of a particular lawyer*

Petitioners have cited two provisions of the Constitution in support of their claim that they have a right to be represented by a particular lawyer: the Assistance of Counsel Clause of the Sixth Amendment (Pet. Br. 33-39) and the Due Process Clause of

the Fifth Amendment (Pet. 8). The decisions of this Court make clear, however, that unlike the Double Jeopardy and Speech or Debate Clauses, there is no express or implicit "right not to be tried" in the language of the Clauses cited by petitioners.

The Sixth Amendment guarantees a criminal defendant a number of discrete procedural and substantive rights: a speedy and public trial, an impartial jury of the state and district wherein the crime was committed, information regarding the nature and cause of the accusation, confrontation with the witnesses against him, compulsory process to obtain defense witnesses, and the assistance of counsel. The language of the Amendment does not share the forward looking, pretrial cast of either the Double Jeopardy Clause [20] or the Speech or Debate Clause.[21] Indeed, the express language of the Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy" the rights thereafter enumerated, without the slightest hint that the full enjoyment of those rights requires interlocutory oversight. There is plainly no textual indication on the face of the Amendment that the rights prescribed therein cannot be adequately protected in the normal course of ap-

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[20] In *Abney*, the Court emphasized that the "twice put in jeopardy" language of the Double Jeopardy Clause "relates to a potential, *i.e.*, the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried" (431 U.S. at 661, quoting *Price* v. *Georgia*, 398 U.S. 323, 326 (1970)).

[21] The Speech or Debate Clause expressly provides that "for any Speech or Debate in either House," congressional representatives *"shall not be questioned* in any other Place." U.S. Const. Art. 1, § 6, cl. 1 (emphasis added). The Clause therefore was "designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Helstoski*, 442 U.S. at 508, quoting *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967).

pellate review by setting aside any conviction procured through a prejudicial violation of those rights.

Consistent with the above analysis, the decisions of this and other federal courts have repeatedly denied interlocutory review of district court orders raising Sixth Amendment concerns. At least one court of appeals has rejected an interlocutory appeal that sought to raise an improper venue claim (*United States* v. *Martin*, 620 F.2d 237, 238 (10th Cir.), cert. denied, 449 U.S. 890 (1980)), and this Court's decisions interpreting the Impartial Jury Clause (see, *e.g.*, *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976); *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974)) and Confrontation Clause (see, *e.g.*, *Smith* v. *Illinois*, 390 U.S. 129 (1968); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Douglas* v. *Alabama*, 380 U.S. 415 (1965)) have likewise never suggested that there is an immediate right to appeal interlocutory orders impacting upon Sixth Amendment rights.[22] Furthermore, in *MacDonald* the Court explicitly held (435 U.S. at 861) that the Speedy Trial Clause of the Sixth Amendment does not afford a criminal defendant the right to an immediate interlocutory appeal of an adverse district court decision: "Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all." Similarly, even assuming that

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[22] Indeed, the fact that objections to a two-tiered jury trial system (*Ludwig*), the denial of a jury trial (*Codispoti*), and the deprivation of cross-examination (*Smith*; *Pointer*; *Douglas*) were all satisfactorily reviewed following the entry of final judgments demonstrates persuasively that there is no compelling need for mid-trial review of Sixth Amendment claims generally.

the Assistance of Counsel Clause of the Sixth Amendment guarantees a right to the services of a particular lawyer, it—like all the other rights secured by the Sixth Amendment—does not embrace a "right not to be tried." [23]

The same is true with respect to district court orders that assertedly violate the Due Process Clause of the Fifth Amendment. In *Hollywood Motor Car Co.* the respondents moved to dismiss the charges against them on the ground that a superseding indictment manifested prosecutorial vindictiveness, citing the due process rule announced in *Blackledge* v. *Perry*, 417 U.S. 21 (1974). The Court, noting the "crucial distinction" between "a right not to be tried" and those constitutional rights that can be adequately vindicated by "the provision of a new trial free of prejudicial error," concluded that an asserted denial of due process "is simply not [a right] that must be upheld prior to trial if it is to be enjoyed at all." *Hollywood Motor Car Co.*, slip op. 5-6 (footnote omitted). It therefore rejected the contention that a claim of prosecutorial vindictiveness creates a right of interlocutory review. The courts of appeals have similarly rejected other attempts to secure immediate review of due process claims.[24] Clearly, then, the language of

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[23] Indeed, rather than encompassing a "right *not* to be tried" without the services of a given lawyer, petitioners' claimed Sixth Amendment right to counsel of choice is more accurately described as a "right *to* be tried" with the assistance of desired counsel. Should that right be infringed, it can be adequately remedied by providing a retrial at which the defendant is represented by desired counsel. Unlike a "right not to be tried," therefore, petitioners' claimed Sixth Amendment right does not require interlocutory review to prevent the right from becoming nugatory.

[24] See, *e.g.*, *United States* v. *Bird*, No. 83-2261 (5th Cir. July 11, 1983), slip op. 5617 (no interlocutory appeal to enforce an

the Due Process Clause does not create a "right not to be tried"—otherwise the contentions presented in cases like *Hollywood Motor Car Co.* would be immediately appealable.[25]

Accordingly, whether petitioners' asserted right to counsel is derived from the Fifth or the Sixth Amendment, it plainly does not include a right to immediate appellate review.

2. The right asserted by petitioners can be adequately protected on appeal from a final judgment

One of the requirements of the "collateral order" doctrine is that the order challenged in a pre-trial appeal must be "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468 (footnote omitted). Apart from *Abney* and *Hel-*

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alleged agreement not to prosecute defendant); *John Doe Corp.* v. *United States*, No. 82-5611 (6th Cir. July 21, 1983), slip op. 5-6 (same); *United States* v. *Butterworth*, 693 F.2d 99, 101 (9th Cir. 1982) (no interlocutory appeal of selective prosecution claim); *United States* v. *Litman*, 661 F.2d 17, 19 (3d Cir. 1981), cert. denied, 454 U.S. 1150 (1982) (no interlocutory appeal of prosecutorial or judicial misconduct); *United States* v. *Sorren*, 605 F.2d 1211, 1214-1215 (1st Cir. 1979) (no interlocutory appeal of personal jurisdiction claim); *United States* v. *Layton*, 645 F.2d 681, 683 (9th Cir.), cert. denied, 452 U.S. 972 (1981) (no interlocutory appeal of subject matter jurisdiction claim). See also *United States* v. *Linton*, 655 F.2d 930, 932 (9th Cir. 1980), cert. denied, 451 U.S. 912 (1981) (no interlocutory appeal to review irregularities in grand jury proceedings); *United States* v. *Garner*, 632 F.2d 758, 766 (9th Cir. 1980), cert. denied, 450 U.S. 923 (1981) (same); *United States* v. *Garcia*, 589 F.2d 249, 252 (5th Cir.) (per curiam), cert. denied, 442 U.S. 909 (1979) (same).

[25] Even a claim of complete immunity from prosecution is not immediately appealable when not based on an interest in protecting the defendant from the trial process itself. *Heike* v. *United States, supra.*

stoski, which involved claims of a constitutional "right not to be tried," this Court has held only one kind of order in a criminal case to be effectively unreviewable on the defendant's appeal from a final judgment of conviction—one regarding bail pending trial. *Stack* v. *Boyle*, *supra*.

The controversy surrounding the issue of bail pending trial, if unreviewed, literally becomes moot by the time of final judgment. *Murphy* v. *Hunt*, 455 U.S. 478 (1982). By contrast, the order in this case can be reviewed after final judgment. If the district court incorrectly disqualified defense counsel, the remedy, if warranted, would be to vacate the conviction and remand for a new trial at which petitioners would be represented by the erroneously disqualified attorney. See *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 378 (reversal and new trial if disqualification order proves erroneous "seems plainly adequate should petitioner's concerns of possible injury ultimately prove well founded"). See also *Glasser* v. *United States*, 315 U.S. 60, 87-88 (1942); *United States* v. *Morrison*, 449 U.S. 361, 364-367 (1981).[26] Indeed, waiting until

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[26] In *United States* v. *Greger*, 657 F.2d at 1113, the Ninth Circuit, in the course of holding that pretrial disqualification orders are not immediately appealable collateral orders, suggested that erroneous disqualification orders would warrant automatic reversal of the conviction. We disagree.

As explained in Part II, it is the government's position that the Constitution does not grant a defendant an absolute right to particular counsel of his choice. A defendant's right to select his own counsel cannot override, in all circumstances, the strong public interest in the fair and efficient administration of the criminal justice system. And, contrary to the Ninth Circuit's assumption in *Greger*, 657 F.2d at 1113, should a district court err in balancing these respective concerns, prejudicial error cannot simply be presumed.

To be sure, this Court has held that certain rights are "so basic to a fair trial that their infraction can never be treated

final judgment will substantially improve the quality of appellate review. Following the entry of a final judgment, the court of appeals will have the benefit of the trial record and will therefore be in a better position to determine whether the district court's pretrial decision to disqualify counsel was in fact reason-

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as harmless error." *Chapman* v. *California*, 386 U.S. 18, 23 & n.8 (1967). See, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (denial of appointed counsel to indigent felony defendants); *Payne* v. *Arkansas*, 356 U.S. 560 (1958) (admission of coerced confession); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (trial before biased judge). But in each of the above cases the constitutional violation infected the fundamental fairness of the entire proceeding, as well as going to the heart of the truth-finding process of the trial court.

The constitutional right assertedly involved in this case, by contrast, is of a different sort entirely. The disputed order does not deprive petitioners of the effective assistance of counsel—only of the assistance of the firm of Sprague & Rubenstone. The fairness of the trial itself will not be inescapably called into question should the order prove to be erroneous. Moreover, if substitute counsel render effective, competent assistance, any possible error in disqualifying Sprague & Rubenstone would not preclude an appellate court from having confidence in the truth-finding process in the trial court. Automatic reversal accordingly would be inappropriate. See 28 U.S.C. 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties"); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). To the extent that disqualified counsel do possess unique skills and abilities, like the ones claimed by counsel in this case (see, *e.g.*, Pet. Br. 4-5), these qualities can be pointed out to the appellate court and evaluated by it in making the determination whether a particular disqualification order, if erroneous, prejudiced a defendant.

able under all the circumstances of the case.[27] Such an approach also conserves scarce appellate resources because, should the defendant be acquitted, there will be no necessity for any appellate review. Thus, delaying review until final judgment will not prevent a court of appeals from remedying an erroneous and prejudicial interference with a defendant's selection of defense counsel, and it will also avoid unnecessary or unduly speculative appellate review. See *MacDonald*, 435 U.S. at 858-859.[28]

3. *Departure from traditional considerations of finality is unwise in the circumstances of this case*

Up to this point, we have concentrated principally upon the third aspect of the collateral order doctrine, as articulated by this Court in *Coopers & Lybrand*, 437 U.S. at 468 (footnote omitted), *i.e.*, that an appealable interlocutory order "be effectively unreviewable on appeal from a final judgment." While, as

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[27] At the conclusion of trial, for example, it will be apparent whether a conflict of interests between particular co-defendants that would preclude joint representation actually did emerge.

[28] While the order in this case is reviewable following final judgment, an order granting a defendant's motion to disqualify *government* counsel presents an entirely different question. Because the government cannot appeal from a final judgment of acquittal (see *United States* v. *DiFrancesco*, 449 U.S. 117, 130 (1980)), and would have no occasion to appeal from a judgment of conviction, such a district court order is effectively unreviewable on appeal from the final judgment, and therefore is justifiably deemed an immediately appealable collateral order. See generally *United States* v. *Caggiano*, 660 F.2d 184, 189-190 (6th Cir. 1981), cert. denied, 454 U.S. 1149 (1982). Cf. 18 U.S.C. 3731 (authorizing interlocutory prosecution appeals). This conclusion is reinforced by the different policies that bear on interlocutory prosecution appeals as compared to interlocutory defense appeals. See note 13, *supra*.

shown above, this factor conclusively establishes the nonappealability of the disqualification order in this case, it is not the sole consideration militating against interlocutory appeal here. Compelling doctrinal and prudential considerations counsel against expanding the scope of the "collateral order" doctrine to include a disqualification order.

Although an order granting a disqualification motion does, in effect, "conclusively determine" the disqualification question in the trial court (*Coopers & Lybrand*, 437 U.S. at 468), it cannot be said that such a determination is "completely separate from the merits of the action" (*ibid.*). Initially, a disqualification order cannot "be reviewed without halting the main trial." *Stack* v. *Boyle*, 342 U.S. at 12 (opinion of Jackson, J.). This single consideration—especially in the context of a criminal prosecution—militates strongly against finding interlocutory disqualification orders appealable as of right.[29]

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[29] In this case, for example, the extensive delay resulting from appellate review of the district court's disqualification order could well undermine the government's case against petitioners. The victims' ability to recall with any specificity the events surrounding their arrests is likely to be hampered by the delay, and the defense's cross examination of their testimony will surely capitalize on the lapse of time. The victims, moreover, generally occupy the lower socio-economic strata of our society and are prone to frequent moves, with concomitant difficulties in keeping in touch with and responding to communications from the government. The prosecution, in fact, was completely unable to locate one of the victims for a substantial period of time. Another victim, Arthur Adams, is 60 years of age and of infirm health. The tactical advantages that such difficulties bestow on the defense are not likely to escape less than scrupulous defense counsel—especially in narcotics and organized crime prosecutions, where joint representation of multiple defendants is distressingly common. See, *e.g.*, *United States* v. *Elrod*, No. 82-2063 (7th Cir. Aug. 19, 1983)

In addition to the fact that review of a disqualification order halts the criminal trial, the disqualification question itself often cannot be successfully separated from the merits of the criminal prosecution. Contrary to the interlocutory claim at issue in *Cohen*, 337 U.S. at 546-547, "which [was] not an ingredient of the cause of action and [did] not require consideration with it," the disqualification order contested by petitioners rests upon the district court's construction of the charging papers filed against petitioners as well as "the numerous pretrial motions, together with supporting memoranda of law, filed by defense counsel" (Pet. App. A16). Any meaningful review of the district court's determination, therefore, is inextricably bound up with the conduct of the criminal trial. Indeed, the court of appeals, in reviewing the district court's order, was required to analyze the indictment, parse petitioners' own pleadings, compare and contrast petitioners' varying roles in the charged conspiracy, predict the future course of conduct by counsel for petitioners and the government, and consider specific evidentiary questions that might arise at trial (Pet. App. A6-A7). The disqualification question presented here, in short, is simply not "collateral" in any real sense to the merits of the criminal case, and the Court cannot find this interlocutory order immediately appealable without substantially expanding the doctrinal foundations of a rule originally crafted to apply only to a "small class" of cases. *Cohen*, 337 U.S. at 546.

(petitioner waives right to separate counsel in state narcotics prosecution but nevertheless raises Sixth Amendment claim in habeas corpus action); *United States* v. *Mers*, 701 F.2d 1321 (11th Cir. 1983) (multiple narcotics defendants engage single attorney and then claim ineffective assistance of counsel on appeal); *United States* v. *Alvarez*, 696 F.2d 1307 (11th Cir. 1983) (same).

Such doctrinal expansion would be particularly unwise in the circumstances of this case. Admittedly, it is "wholly desirable to correct prior to trial any substantive errors noticed at that time." *Hollywood Motor Car Co.*, slip op. 5, But a litigant's generalized interest in reversing unfavorable trial court rulings has never been considered sufficient to warrant interlocutory appeal of otherwise nonfinal orders. Indeed, there are a whole host of interlocutory trial court rulings on various constitutional, procedural and substantive issues that may be adverse to the accused (*i.e.*, refusals to exclude evidence on Fourth Amendment grounds, denials of motions for severance or continuance, and admission into evidence of alleged hearsay evidence) that regularly and routinely await conviction and imposition of sentence prior to appellate review. Although there is obvious value " 'in triumphing before trial, rather than after it,' " the Court has consistently held that "reversal of the conviction and, where the Double Jeopardy Clause does not dictate otherwise, the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused." *Id.* at 5-6 (footnote omitted), quoting *MacDonald*, 435 U.S. at 860.[30]

[30] The case for appealability of an order disqualifying defense counsel is even weaker than that found insufficient in *MacDonald* and *Hollywood Motor Car Co.* In each of those cases, the remedy sought was complete dismissal of the charges. Thus, if pretrial appeals had been allowed and decisions favorable to the defendants had been rendered, the possible result of interlocutory appeal in those cases would have been expeditious resolution of a criminal prosecution. Here, however, the only certain effect of interlocutory appeal is delay. (The disqualification order in this case was entered on December 2, 1981.) Allowance of an immediate appeal in the context of this case merely undermines the " 'societal interest in providing a speedy trial which exists separate from, and at times

There is, furthermore, nothing in the nature of the constitutional right asserted by petitioners that warrants exceptional treatment. Although interlocutory appeal may be appropriate in some circumstances to protect significant constitutional prerogatives against encroachment, the right claimed by petitioners plainly cannot claim such preeminence. The district court's order in this case does not deny petitioners the effective assistance of counsel—only the assistance of Sprague & Rubenstone. Indeed, the "right" that petitioners are asserting here is simply the right to insist upon representation by a firm willing to undertake employment under circumstances in which the vast majority of attorneys would withdraw. See Model Code of Professional Responsibility DR 5-105(C) (1980); Model Rules of Professional Conduct Rule 1.7 (52 U.S.L.W. at 7); Standards Relating to the Defense Function § 3.5(b) (1980). Whatever the "importance" of such a right, it is hardly more important than a myriad of other constitutional rights implicated during the course of a criminal prosecution. Cf. *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 12 (footnote omitted) (the Sixth Amendment does not guarantee "a 'meaningful relationship' between an accused and his counsel"). Should this Court conclude that the relative value of the right allegedly infringed by the disqualification order in this case is great enough to warrant interlocutory review, "numerous other questions would fall under such [an analysis], and the policy against piecemeal appeal in criminal cases would be swallowed by ever-multiplying exceptions." *Hollywood Motor Car Co.*, slip op. 7.[31]

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in opposition to, the interests of the accused.' " *MacDonald*, 435 U.S. at 862, quoting *Barker* v. *Wingo*, 407 U.S. at 519.

[31] If this Court holds that an order disqualifying defense counsel is immediately appealable because of its impact on the

Finally, application of the final judgment rule to disqualification orders will not foreclose immediate review of such orders in truly unusual cases. In

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relationship between the defendant and his counsel of choice, the Court can anticipate a proliferation of claims by defendants that various other orders are likewise immediately appealable. To take the most obvious example, criminal defendants can be expected to assert that the denial of a continuance infringes upon the same right. See generally note 39, *infra*. If the district court's denial of a continuance is appealable, or even colorably so, the court will lose a substantial portion of its discretion in granting and denying such orders. See *Ungar* v. *Sarafite*, 376 U.S. 589 (1964). A defendant will be able to obtain a continuance simply by appealing its denial.

Moreover, although the disqualification order in the present case resulted from the joint representation of co-defendants with potentially conflicting interests, it is important to keep in mind that other grounds for disqualification also often arise. For example, counsel may be laboring under a conflict of interest between the defendant and a former client who will testify at trial as a prosecution witness. See, *e.g.*, *United States* v. *Agosto*, 675 F.2d 965, 971 (8th Cir.), cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982), in which a major organized crime prosecution was delayed for nearly one year while such a disqualification order was appealed and reappealed. See also *United States* v. *Provenzano*, 620 F.2d 985, 1005 (3d Cir. 1980), cert. denied, 449 U.S. 899 (1981) (discussing dangers of successive representation). In addition, there have been cases in which defense counsel is himself a target of an ongoing investigation of his clients (see, *e.g.*, *Cintolo* v. *United States*, cert. denied, No. 82-1383 (May 31, 1983)), or is otherwise involved in the criminal activities with which his client is charged (*e.g.*, *United States* v. *Hobson*, 672 F.2d 825, 828 (11th Cir. 1982)). Because, as is all too often the case, defendants can secure the cooperation of lawyers who are willing to blink the ethical principles that exist to regulate the practice of law, recognition of a right of interlocutory appeal for the broad spectrum of situations in which disqualification may be appropriate will encourage defendants to create conflict-of-interest situations in order to delay their trials.

Firestone Tire, 449 U.S. at 378-379 n.13, the Court suggested that, "in the exceptional circumstances for which it was designed," a writ of mandamus would be appropriate to review a district court's denial of a disqualification motion. We assume that the writ will also be available, where appropriate, to review the interlocutory grant of a disqualification motion in a criminal case.

Although the standards for issuance of the writ are strict (*Will* v. *United States*, 389 U.S. 90 (1967)), mandamus has several obvious advantages over interlocutory appeal in circumstances like those of this case. Mandamus, first of all, permits a defendant to obtain immediate redress where a disqualification order is blatantly erroneous and the impending harm is great; the defendant need not await final judgment "in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper." *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824).[32] In contrast to an appeal, moreover, a petition for a writ of mandamus can be disposed of with considerable expedition, thus furthering the important societal interest in the speedy resolution of criminal prosecutions.[33] Perhaps most

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[32] See also *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259-260 (1957) (mandamus proper in exceptional circumstances to insure proper judicial administration); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111 (1964) (same).

[33] Because mandamus is a discretionary remedy, an appellate court can reject mandamus petitions without a hearing and upon submissions from the petitioner only. Fed. R. App. P. 21(a) and (b). Mandamus petitions are given priority on the appellate docket (Fed. R. App. P. 23(b)), and the petition itself provides the court with the information necessary to determine whether the writ should issue (Fed. R. App. P. 21(a)). By comparison, a notice of appeal does not give the appellate court any information necessary to decide the question before

importantly, however, mandamus does not automatically divest the district court of jurisdiction to proceed with the trial and accordingly does not engender the delay and disruption that would be created by this Court's recognition of a general right of interlocutory appeal for such orders. Mandamus, properly confined, makes no broad inroad upon traditional concepts of finality, and finality, as Justice Frankfurter noted in *Cobbledick* (309 U.S. at 326), is not a mere "technical concept," but rather "the means for achieving a healthy legal system." See J. Moore, B. Ward & J. Lucas, 9 *Moore's Federal Practice* ¶ 110.26, at 286 (2d ed. 1982) ("With respect to the demands of justice made by individual cases, it seems clear that discretionary review by mandamus is to be preferred to enlarging by judicial interpretation the categories of interlocutory orders that are appealable as of right").

Accordingly, because the district court's order disqualifying defense counsel was not immediately appealable, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss the appeal.

II. IF APPEALABLE, THE DISTRICT COURT'S DISQUALIFICATION ORDER SHOULD BE AFFIRMED

Petitioners claim the unrestricted right to be represented by a single law firm of their choosing. They begin with the premise that the Sixth Amendment guarantees them the right to counsel of choice, and contend that this right extends even to those situa-

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it (see Fed. R. App. P. 3(c)), and the appeal itself—even if expedited—can be disposed of only following completion of briefing by both parties. See, *e.g.*, Fed. R. App. P. 11(a), 12(a) and 31(a). Thus, even summary dismissal of an appeal may be expected to take longer than denial of mandamus.

tions where the district court finds that multiple representation is contrary to settled standards of ethical legal conduct. See, *e.g.*, Pet. Br. 33-34. Contrary to petitioners' assumption, however, the Constitution does not unconditionally guarantee a defendant the right to be represented by a particular lawyer, or place the decision by multiple defendants to be represented by the same lawyer above judicial scrutiny. Indeed, to the extent such rights exist, it is clear that they are not absolute, but rather are subject to various reasonable restrictions. One of the most basic of these restrictions is the unremarkable fact that, just as he cannot retain a disbarred attorney or a lay spokesman, a defendant cannot retain a particular attorney when such employment would be contrary to the settled ethical standards that govern the practice of attorneys before United States courts.

Several threshold observations are necessary to put petitioners' claim that they have a constitutional right to insist upon the services of Sprague & Rubenstone in context. First, it is no part of the government's assertion here that criminal defendants do not ordinarily enjoy the right (from wherever it may be derived) to retain counsel of their choice from among the universe of attorneys who are members in good standing of the bar of the court in which the defendant is to be tried. Rather, the sole question is whether that universe may be slightly constricted by eliminating those few attorneys or firms who cannot accept the representation without violating widely recognized ethical standards for the practice of law. Second, in contrast to other rights of criminal defendants assertable and enforcible directly against the government, such as the right to a speedy and public trial, the defendant's retention of a particular lawyer depends on that lawyer's willingness to undertake the

representation—something neither the court nor the prosecution can compel. Thus, the "right" to be represented by an attorney burdened with a conflict of interest is entirely dependent upon the ability to find an attorney who is willing to undertake such professionally questionable representation—something we believe most attorneys would be unwilling to do. It is against this background that the alleged infringement of petitioners' "right" to representation by counsel of their choice must be evaluated.

A. The Sixth Amendment Does Not Protect A Defendant's Decision To Engage A Particular Lawyer

Without analysis or elaboration, petitioners' assert (Br. 33) that the Sixth Amendment "right to counsel" has "two prongs"; *i.e.*, "the defendant's right to counsel of choice and the defendant's right to conflict-free counsel." See also Pet. Br. 27, 29. But, while the second "prong" of petitioners' asserted Sixth Amendment right is well-established (*Cuyler* v. *Sullivan*, 446 U.S. 335 (1980)), the first "prong" plainly does not share that distinction. Indeed, this Court has never suggested that the Assistance of Counsel Clause guarantees the right, absolute or otherwise, to engage the services of a particular lawyer. To the contrary, the Court's rejection in *Morris* v. *Slappy* (slip op. 12) of the contention that the Sixth Amendment protects a defendant's right to a "meaningful relationship" with his attorney is wholly inconsistent with petitioners' assertion of such a right. Cf. *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983) slip op. 6 (counsel does not have constitutional duty to raise every nonfrivolous issue requested by defendant). To be sure, a number of courts of appeals have suggested, without significant analysis, that the Sixth Amendment provides some protection for a defend-

ant's choice of counsel.[34] But those courts have also recognized that any right to counsel of choice is necessarily limited,[35] and the decisions themselves rest upon an overly expansive interpretation of the Assistance of Counsel Clause.

The central purpose of the Sixth Amendment right of an accused to the assistance of counsel for his defense is "to assure fairness in the adversary criminal process." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Defense counsel serves to counterbalance the skilled prosecutor. *United States* v. *Ash*, 413 U.S. 300, 308-309 (1973); *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). This Court's cases construing the Assistance of Counsel Clause say nothing about the right to select a particular attorney.[36]

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[34] See, *e.g.*, *United States* v. *Agosto*, 675 F.2d 965, 969 (8th Cir. 1981); *Linton* v. *Perini*, 656 F.2d 207, 209-211 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *United States* v. *Laura*, 607 F.2d 52, 56-57 (3d Cir. 1979); *United States* v. *Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *United States* v. *Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976) (en banc), cert. denied, 429 U.S. 1104 (1977); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975); *United States* v. *Inman*, 483 F.2d 738, 739-740 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974).

[35] See cases cited at pages 42-43, *infra*.

[36] *Faretta* v. *California*, 422 U.S. 806 (1975), cited by virtually all of the courts of appeals that have found constitutional protection for a defendant's choice of a particular lawyer, did not rely on the Assistance of Counsel Clause and has nothing to do with choice of counsel. In that case, the Court held that implicit in the structure of the Sixth Amendment is the right of a criminal defendant to forego counsel and to represent himself. 422 U.S. at 818-820 & n.15. The right thus recognized was expressly held not to be in any way a manifestation of the right granted by the Assistance of Counsel Clause, but rather is an "*independent* right of self-representation." *Id.* at 820

Thus, so long as a defendant receives the effective assistance of some attorney, the demands of the Sixth Amendment have been met. Nothing in the language

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n.15 (emphasis in original). See *United States* v. *Wilhelm*, 570 F.2d 461, 466 (3d Cir. 1978) ("*Faretta* recognized two independent Sixth Amendment rights of representation—the right of self-representation and the right to assistance of counsel"). See also *United States* v. *Kelley*, 539 F.2d 1199, 1202 (9th Cir.), cert. denied, 429 U.S. 963 (1976). *Faretta* therefore has minimal relevance in determining whether a right to counsel of choice is subsumed within the Assistance of Counsel Clause.

In addition to *Faretta*, many courts cite *Powell* v. *Alabama*, 287 U.S. 45 (1932), to support their conclusion that the Sixth Amendment protects a defendant's right to counsel of choice. But, like *Faretta*, the citation is inapposite. *Powell* had nothing to do with a court's rejection of a defendant's chosen counsel; rather, the state court system had completely denied the defendants the opportunity to obtain any counsel. This occurred, moreover, during a period when appointment of counsel for the indigent was far from common. Therefore, when the Court stated that the defendants should have been "afforded a fair opportunity to secure counsel of [their] choice" (287 U.S. at 53), the Court was not suggesting that the defendants had the right to engage the services of a *particular* lawyer. Rather, the Court was emphasizing that the defendants should have been given the opportunity to obtain the effective assistance of counsel by the only certain method then available—employment of private counsel.

More in point is *Andersen* v. *Treat*, 172 U.S. 24 (1898), in which a habeas corpus petitioner claimed that "he was denied the assistance of counsel for his defence,' that is, the assistance of counsel of his own selection." *Id.* at 29. The complaint was that he was not allowed to retain the lawyer hired by five other suspects because the district judge believed his defense to be " 'inconsistent with the defence of others charged.' " *Id.* at 30. This Court affirmed the denial of habeas corpus relief, citing the then-current restrictive standard for availability of habeas corpus. The decision nevertheless suggests the nonexistence of the constitutional right to counsel of choice claimed by the petitioner, stating that the "exceptions to this rule [that

of the Sixth Amendment suggests that the right to counsel is a matter of personality, or that every defendant is entitled to the skilled assistance of a lawyer he likes.[37] So long as a defendant receives effective assistance from some skilled counsel—whom, if the defendant is not indigent, he is free to select from the entire universe of eligible attorneys whose participation in the trial would not be improper—the purpose behind the Sixth Amendment has been fully satisfied. *United States* v. *Morrison*, 449 U.S. at 365.

B. Any Right To Engage The Services Of A Particular Lawyer Is A Qualified One, Subject To Reasonable Restrictions

Notwithstanding petitioners' invocation of the Sixth Amendment, the nature of a criminal defendant's desire to be represented by a particular attorney is not, in fact, materially different from the like desire of a party to a civil case. And, to the extent the Constitution protects that interest, it is presumably by means of the Due Process Clauses of the Fifth and Fourteenth Amendments. Should the Court be prepared to recognize that a defendant has some

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the judgment of a court with jurisdiction over the offense and the defendant is not subject to collateral attack] when some essential right has been denied need not be considered." *Id.* at 31.

[37] There is no evidence to suggest that the Framers of the Amendment intended to protect a defendant's decision to engage a particular lawyer. See *Faretta*, 422 U.S. at 831 n.42: " 'The available debates on the various proposals [for a right-to-counsel provision] throw no light on the significance or the interpretation which Congress attributed to the right to counsel.' W. Beaney, The Right to Counsel in American Courts 23 (1955)." About all that can be said is that the Framers intended to alter the rule, then current in England, that denied the assistance of counsel to defendants in all felony cases, except those in which treason was charged. See, *e.g.*, *Faretta*, 422 U.S. at 823-826; *Powell* v. *Alabama*, 287 U.S. at 60.

constitutional right to engage the services of a particular lawyer, therefore, the Due Process Clause of the Fifth Amendment appears to be the proper analytical basis for that right. But, whatever the foundation for petitioners' claimed right to counsel of choice, that right is plainly not absolute. As the Court wrote in *Powell* v. *Alabama*, 287 U.S. at 69 (emphasis added), a trial court would violate "due process in the constitutional sense" only if it "were *arbitrarily* to refuse to hear a party by counsel, employed by and appearing for him." [38]

Every court of appeals has explicitly held, or at least clearly recognized, that the accused has no absolute right to counsel of his choice. See, *e.g.*, *United States* v. *Poulack*, 556 F.2d 83, 86 (1st Cir.), cert. denied, 434 U.S. 986 (1977); *United States* v. *Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979); *United States* v.

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[38] *Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954) (footnote omitted), is not to the contrary, even though the Court there stated that the petitioner's "right to be heard through his own counsel was unqualified." In *Chandler*, the state trial court denied the petitioner's request for a continuance to obtain counsel when, immediately before trial on a housebreaking and larcency charge, petitioner was informed he was also to be tried as an habitual criminal. The State argued that, because petitioner was ineligible for appointment of counsel under *Betts* v. *Brady*, 316 U.S. 455 (1942), the court's failure to grant the continuance was not reversible error. This Court rejected that argument because petitioner sought the continuance to obtain retained rather than appointed counsel. 348 U.S. at 9. In this context, then, the Court used the term "unqualified" merely to contrast petitioner's "qualified" right to *appointed* counsel with his undoubted right to hire counsel on his own. The language does not suggest that a defendant has an absolute right to insist upon counsel of choice, without regard to reasonable rules regulating the practice of law and the administration of justice—a question that was in no way before the Court. See *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).

Dolan, 570 F.2d 1177, 1183 (3d Cir. 1978); *United States* v. *Inman*, 483 F.2d 738, 739-740 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974); *United States* v. *Kitchin*, 592 F.2d 900, 903 (5th Cir.), cert. denied, 444 U.S. 843 (1979); *Linton* v. *Perini*, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976); *United States* v. *Agosto*, 675 F.2d 965, 970 n.4 (8th Cir.), cert. denied after remand and subsequent affirmance *sub nom. Gustafson* v. *United States*, No. 81-2270 (Oct. 4, 1982); *United States* v. *Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); *United States* v. *Peister*, 631 F.2d 658, 661 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States* v. *Hobson*, 672 F.2d 825, 827, 829 n.* (11th Cir.), cert. denied, No. 82-57 (Oct. 12, 1982); *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979). Thus, unlike the basic right to the assistance of counsel, *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963), or the right of self-representation, *Faretta* v. *California*, *supra*, each of which must be respected in all criminal cases, any right to counsel of choice, constitutional or otherwise, is plainly subject to reasonable limitations.

First, and most obvious, a defendant's right to counsel of choice is limited by the willingness of a particular attorney to represent him. No court to our knowledge has ever held that it has the power to force a lawyer to represent a defendant simply because the defendant wants that particular lawyer. Thus, the right to counsel of choice, if any, is wholly unlike the right to counsel recognized in *Powell* and *Gideon*, which can and must be enforced directly by the courts.

The decisions of this Court and other federal courts have recognized as legitimate and permissible

a number of other restrictions on the asserted right to counsel of choice. For example, in view of the public need for the efficient administration of criminal justice, the trial court has the discretion to deny a continuance in order to control its own docket, even when denying the continuance will effectively interfere with a defendant's desire to be represented by a particular lawyer.[39] The courts have also consistently held that even though an indigent defendant is entitled to appointment of counsel, he is not entitled to appointment of the particular lawyer of his choosing.[40] And, most significantly for this case, district courts have been held to possess considerable power to disapprove the defendant's choice of representative. Thus, a defendant is not entitled to be represented by a layman,[41] even if the layman has legal training.[42]

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[39] See generally *Ungar* v. *Sarafite*, 376 U.S. at 589 ("The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel"). See also *United States* v. *Burton*, 584 F.2d at 489-492; *United States* v. *Poulack*, 556 F.2d at 86; *United States* v. *Inman*, 483 F.2d at 740; *United States ex rel. Carey* v. *Rundle*, 409 F.2d 1210, 1213-1216 (3d Cir. 1969).

[40] *Morris* v. *Slappy*, *supra*; *United States* v. *Davis*, 604 F.2d 474, 478-479 (7th Cir. 1979); *United States* v. *Smith*, 464 F.2d 194, 197 (10th Cir.), cert. denied, 409 U.S. 1066 (1972); *United States* v. *White*, 451 F.2d 1225, 1226 (6th Cir. 1971).

[41] *United States* v. *Bertolini*, 576 F.2d 1133 (5th Cir. 1978); *United States* v. *Buttorff*, 572 F.2d 619, 627 (8th Cir.), cert. denied, 437 U.S. 906 (1978); *United States* v. *Wilhelm*, 570 F.2d at 466; *United States* v. *Taylor*, 569 F.2d 448, 450-451 (7th Cir.), cert. denied, 435 U.S. 952 (1978); *United States* v. *Kelley*, 539 F.2d at 1203.

[42] *United States* v. *Grismore*, 546 F.2d 844, 847 (10th Cir. 1976) (disbarred lawyer); *United States* v. *Hinderman*, 528

Indeed, a court need not permit representation even by a licensed attorney if the attorney is not a member of the court's bar.[43]

Finally, even if the defendant's chosen counsel is otherwise qualified to practice before the court, many decisions have recognized that counsel may properly be dismissed if continued representation would violate the Code of Professional Responsibility or would tend to undermine public confidence in the integrity of the legal system.[44] Accordingly, counsel have been disqual-

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F.2d 100, 102-103 (8th Cir. 1976) (same). See generally *Ex parte Wall*, 107 U.S. 265, 288 (1882) (holding that criminal conviction is not a prerequisite for striking attorney from rolls of practicing attorneys, stating "the courts ought not to hesitate * * * to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws").

[redacted] See *Leis* v. *Flynt*, 439 U.S. 438 (1979) (holding that out-of-state attorneys, not admitted to practice law in Ohio, had no constitutional right of their own to appear pro hac vice on behalf of criminal defendant in Ohio state courts). See also *Bedrosian* v. *Mintz*, 518 F.2d 396, 400-401 (2d Cir. 1975) (state court's refusal to appoint out-of-state counsel for indigent defendants held constitutional). See generally 28 U.S.C. 1654 (permitting parties in federal courts to conduct their cases themselves or by such counsel "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein"); Rules 5 and 6 of the Supreme Court of the United States (regulating appearance of attorneys before this Court).

[44] See *United States* v. *Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring) ("A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop * * * professional misconduct"). See also *United States* v. *Agosto*, 675 F.2d at 969, 976-977 (noting district court's responsibility for supervising members of its bar, as guided by Model Code of Professional Responsibility, in order to maintain public confidence in the legal profession

ified where representation of several persons involved in the litigation has either created a conflict of interest or given rise to a strong likelihood that an actual

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and to ensure integrity of judicial proceedings; affirming order disqualifying counsel for secretary where his primary loyalty was to her employer and co-defendant); *United States* v. *Hobson*, 672 F.2d at 828-829 (affirming order disqualifying defense counsel in drug trafficking case where government represented that witnesses would testify at trial that defense counsel had advance personal knowledge of some of the trafficking charged in the indictment; court cited Canon 9's proscription against appearance of impropriety and held that likelihood of public suspicion of lawyer's wrongdoing outweighed defendant's interest in being represented by attorney in question); *United States* v. *Ostrer*, 597 F.2d at 340-341 (affirming order disqualifying defense counsel where counsel had previously, as government attorney, participated in investigation involving three prospective witnesses at Ostrer's trial; court cited potential for use of privileged information and relied upon Canon 4 of the Model Code of Professional Responsibility); *United States* v. *Kitchin*, 592 F.2d at 903-904 (violation of accepted standards of legal ethics supports disqualification order; affirming order disqualifying defense counsel where attorney had been involved in early stage of case on behalf of the United States, citing Canon 4); *United States* v. *Dolan*, 570 F.2d at 1184 (affirming order disqualifying defense counsel where counsel had a conflict of interest, citing Model Code of Professional Responsibility DR 5-105(C) (1980), and stating that the court need not tolerate inadequate representation of defendant, because such representation invites disrespect for the integrity of the court and leads to future litigation attacking the proceedings); *United States* v. *Dinitz*, 538 F.2d at 1219-1224 (affirming district court's banning of defense counsel from courtroom following repeated instances of misconduct, citing Standards for Criminal Justice respecting making of bad faith arguments to jury and intentional disruptions of criminal proceedings).

See generally Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 Fordham L. Rev. 1097 (1976).

conflict of interest will emerge in the course of the proceedings.[45]

C. A Criminal Defendant Has No Right To Insist On A Particular Attorney Where Such Representation Is Contrary To The Accepted Ethical Standards Of The Legal Profession

1. The roots of the legal profession's general abjuration of multiple representation may well be as deep as the Biblical warning that "[n]o man can serve two masters." Matt. 6:24. And the inherent risk that an attorney serving two clients will "hold to the one, and despise the other" (*ibid.*) is nowhere so great as in the defense of a criminal prosecution.

While there is no flat prohibition on multiple representation of defendants in criminal cases, and such representation does not per se violate the Sixth Amendment's guarantee of effective assistance of counsel (*Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980); *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978)), this Court has recognized for decades the inherent evils of multiple representation. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60 (1942). A succint description of those evils is contained in *United States* v. *Curcio*, 680 F.2d 881, 887 (2d Cir. 1982):

> Our uneasiness about sanctioning the joint representation of criminal defendants persists because the dangers of prejudicial conflict are

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[45] See *United States* v. *Phillips*, 699 F.2d at 802-803 (affirming district court's order disqualifying defense counsel in narcotics prosecution where attorney also represented, and was being paid by, defendant's alleged supplier; held that strong likelihood that conflict of interests would arise in the course of proceedings justified pretrial disqualification); *United States* v. *Agosto*, *supra* (discussed in note 44, *supra*); *United States* v. *Dolan*, *supra* (discussed in note 44, *supra*).

both ubiquitous and insidious. "[A] possible conflict inheres in almost every instance of multiple representation," *Cuyler* v. *Sullivan*, *supra*, * * * in part because the interests of the defendants may diverge at virtually every stage of the proceeding, * * *. Thus, the joint attorney may have to prefer the interests of one defendant over the other in deciding, for example, whether to accept or reject a plea bargaining offer to one defendant conditioned on that defendant's testifying against the other; whether or not to present a defense that helps one defendant more than the other; whether or not to cross-examine a witness whose testimony may help one defendant and hurt the other; whether to have one defendant testify while the other remains silent; whether to have neither defendant testify because one would be a poor or vulnerable witness; whether or not to emphasize in summation that certain evidence is admitted only against (or is less compelling against) one defendant rather than the other; whether or not to argue at sentencing that one defendant's role in the criminal enterprise was shown only to be subordinate to that of the other defendant. These dilemmas are insidious because it often is not clear that the conflict of interests, and not pure trial strategy, are the reasons for the tactics adopted—or foregone—at trial. As the Supreme Court observed in *Holloway* v. *Arkansas*, "[j]oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing," 435 U.S. at 489-90, 98 S. Ct. at 1181; "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process," *id.* at 490, 98 S. Ct. at 1181 (emphasis in original).

See generally, Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 Minn. L. Rev. 119, 125-135 (1978); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 Va. L. Rev. 939, 941-950 (1978); Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 J. Crim. L. & Criminology 226, 233-239 (1977); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244 (1981). See also *United States* v. *DeFillipo*, 590 F.2d 1228, 1238 & n.17 (2d Cir.), cert. denied, 442 U.S. 920 (1979); Rule 44(c) Advisory Committee Note, 77 F.R.D. 594-600 (1978) (quoting numerous authorities). Cf. *Wood* v. *Georgia*, 450 U.S. 261 (1981) (discussing potential conflict of interests between defendants and third person who engaged their attorney); Criminal Justice Act, 18 U.S.C. 3006A(b) ("[T]he court shall appoint separate counsel for defendants who have such conflicting interests that they cannot be properly represented by the same counsel").

As explained by the commentators, the problems posed by multiple representation are compounded by the fact that the lay defendant will often fail to appreciate the way in which a conflict can affect an attorney's performance of his duties. See Geer, 62 Minn. L. Rev. at 141, 154; Lowenthal, 64 Va. L. Rev. at 971; *Developments*, 94 Harv. L. Rev. at 1395. Nor can the judge be depended upon to advise the defendant of all of the possibilities, for the judge will usually lack sufficient familiarity with the facts, and may be prevented from gaining such familiarity by the Fifth Amendment and attorney-client privileges. Geer, 62 Minn. L. Rev. at 141-142; Lowenthal, 64 Va. L. Rev. at 970. Nor, one must reluc-

tantly conclude, can the private bar be counted on to adequately educate joint defendants or withdraw in all cases in which multiple representation involves serious conflicts. First, it may be in the interest of some defendants, but not others, that the joint representation be maintained; the lawyer saddled with these conflicting interests will often be in an exceedingly poor position to give each client adequate advice regarding the decision whether to waive the right to conflict-free representation. Second, the retained counsel's financial interest inhibits voluntary withdrawal, and indeed may further contribute to the difficulty of giving the client disinterested advice on whether to retain separate counsel.[46]

Given the current lack of effective safeguards to prevent debilitating conflicts of interests, some have called for the total abolition of multiple representation in criminal cases. Geer, 62 Minn. L. Rev. at 157-162; Lowenthal, 64 Va. L. Rev. at 988-989; *Developments*, 94 Harv. L. Rev. at 1395. Such an ap-

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[46] See Geer, 62 Minn. L. Rev. at 145, 152-153; Judd, 44 Fordham L. Rev. at 1099-1107; Lowenthal, 64 Va. L. Rev. at 950-972 (survey showing that while many public defenders never engage in multiple representation, the private bar is far more willing to represent co-defendants). See also *Cuyler* v. *Sullivan*, 446 U.S. at 346-347 n.11 (after citing above studies, Court notes that while public defender offices have "a strong policy against undertaking multiple representation in criminal cases," the "private bar may be less alert to the importance of avoiding multiple representation"). Cf. *Wood* v. *Georgia*, 450 U.S. at 265 n.5 (Court reaches conflict of interest question despite the fact that the issue was not raised in the certiorari petition, precisely because the attorney who "prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused"; Court finds that "[i]t is unlikely that he would concede that he had continued improperly to act as counsel").

proach "would go a long way toward eliminating conflicts of interest in the criminal area" (*Developments*, 94 Harv. L. Rev. 1395-1396), while leaving the defendant free to choose counsel from among the large number of eligible attorneys who have no conflict of interest. As noted earlier, "there are many limitations upon the ability of a defendant to choose counsel under current law," and a total prohibition of joint representation would "simply impose[] one more: if an attorney represents one defendant in a particular criminal matter, the other defendants would have to find legal representation elsewhere." Geer, 62 Minn. L. Rev. at 160.[47] In the absence of any such blanket prohibition, however, the legal profession and the courts have adopted certain intermediate steps designed to prevent ineffective assistance of counsel attributable to multiple representation.

Thus, the American Bar Association has promulgated a mandatory disciplinary rule forbidding multiple representation unless "it is obvious that [the lawyer] can adequately represent the interest of each [client] and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Model Code of Professional Responsibility DR 5-105(C) (1980).[48]

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[47] If petitioners' broad assertions are correct, however, such a measure would be unconstitutional, no matter how reasonable it might be as a regulation of the practice of law and an aid to the fair and efficient administration of criminal justice.

[48] The newly promulgated Model Rules of Professional Conduct, adopted by the American Bar Association at the August 1983 Annual Meeting, provide that a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after

Similarly, Section 3.5(b) of the Standards Relating to the Defense Function (1980) provides:

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear that:
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> (i) no conflict is likely to develop;
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> (ii) the several defendants give an informed consent to such multiple representation; and
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> (iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully compre-

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consultation." Rule 1.7, Model Rules of Professional Conduct, 52 U.S.L.W. 1, 7 (Aug. 16, 1983). The new rule does not retreat from DR 5-105(C), but rather makes clear that, contrary to petitioners' assertion (Pet. Br. 37), a trial court need not defer to an attorney's decision to undertake employment despite possible conflicts of interest. If, in the circumstances of a given case, it is unreasonable to assume that conflicts of interest will not arise, joint representation may not be undertaken, notwithstanding counsel's willingness. And, as the comment to the new rule emphasizes, "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant." 52 U.S.L.W. at 7.

> hend the difficulties that an attorney sometimes encounters in defending multiple clients.
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> In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct.

In addition, Fed. R. Crim. P. 44(c) requires federal district courts to inquire into all instances of multiple representation of defendants and to "take such measures as may be appropriate," unless "it appears that there is good cause to believe no conflict of interest is likely to arise." Those measures include the "possibility * * * that the court will order that the defendants be separately represented in subsequent proceedings in the case." Rule 44(c) Advisory Committee Note, 77 F.R.D. at 601.[49]

2. The district court and the court of appeals were both clearly correct in finding that Sprague & Rubenstone's continued multiple representation of the four petitioners would violate the accepted ethical standards of the legal profession, as embodied in the Model Code of Professional Responsibility and the Standards for Criminal Justice.[50] In such circumstances, disqualification is an entirely appropriate judicial response, notwithstanding petitioners' avowed desire to retain the firm. Rule 44(c) Advisory Committee

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[49] The Advisory Committee Note states that, despite a defendant's desire to be represented by a particular attorney, a trial court need not tolerate conduct that fails to conform with the Model Code of Professional Responsibility. " 'Under such circumstances, the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation' " (77 F.R.D. at 603, quoting *United States* v. *Dolan*, *supra*).

[50] E.D. Pa. R. 7 provides: "The canons of ethics of the American Bar Association as now existing be and as hereafter modified shall become standards of conduct for attorneys of this Court."

Note, 77 F.R.D. at 600-603. Indeed, the only reason a counsel of choice issue even remains in this case is because of Sprague & Rubenstone's persistent refusal to withdraw from joint representation, even in the face of its own pretrial pleadings grounded upon the differing interests of its clients.

Despite counsel's assurance that its joint representation of petitioners raises no ethical concerns (Pet. Br. 37), it is neither "obvious that [Sprague & Rubenstone] can adequately represent the interest" of each petitioner (Model Code of Professional Responsibility DR 5-105(C) (1980)), nor "clear that no conflict is likely to develop" (Section 3.5(b), Standards Relating to the Defense Function (1980)). And counsel's asserted belief (Pet. Br. 37) that "the representation will not adversely affect" the interests of the petitioners is far from "reasonabl[e]." Rule 1.7, Model Rules of Professional Conduct, 52 U.S.L.W. at 7. Rather, as the district court stated, the "potential for conflict just jumps out in this case" (Pet. App. A40). All four petitioners are charged with making false arrests. Petitioner Flanagan, the street decoy, had virtually all of the initial interaction with the petitioners' alleged victims. He was the one who called to the other three petitioners for assistance from their places of hiding. Obviously, as to those three, one major potential line of defense is that they lacked any criminal intent, since even if Flanagan intended to arrest innocent citizens without probable cause, their actions may have been taken in good faith. Other conflicts are equally apparent.[51]

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[51] How, for example, will joint counsel be able to protect the interests of all petitioners if one takes the stand to exculpate himself but blames one or more of the others? How is joint counsel to protect the interests of all petitioners if a particularly damaging piece of evidence is admissible against only

These difficulties, moreover, are not mere potentialities: petitioners' own pretrial pleadings already seek to take advantage of what they assert is the "gross disparity" in the inculpatory evidence against Flanagan and the other three (J.A. A20). By moving to dismiss Count I of the indictment because of petitioners' varying involvements in the alleged conspiracy (Pet. App. A6), and by seeking a severance of petitioner Flanagan's trial because the other petitioners would "suffer severe prejudice" if tried with him (J.A. A18), counsel for petitioners has made it abundantly clear that conflicts of interest lurk in every stage of the proceedings. In the government's view, therefore, continued multiple representation is unethical, and a trial court has the authority to require that the petitioners be separately represented.[52] Far from being an arbitrary interference with petitioners' right to counsel of choice, the disqualification

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one of them? If the government introduces a fairly weak case against one petitioner, how can joint counsel emphasize that weakness without by implication admitting the strength of the case against the others? Conversely, how can joint counsel minimize that implication without damaging the interests of the petitioner against whom the evidence is weak?

[52] Indeed, although counsel for petitioners repeatedly asserts that an actual conflict of interests will never arise in this litigation (Pet. Br. 8-10, 47-49), the pleadings drafted by counsel suggest that an actual conflict has already arisen. Justice Marshall, writing separately in *Cuyler* v. *Sullivan*, 446 U.S. at 356 n.3, stated that an actual conflict of interest arises any time "the defendants' interests * * * diverge with respect to a material factual or legal issue or to a course of action." Petitioners' pretrial pleadings, which unsuccessfully requested dismissal of Count I because of their differing involvement in the alleged conspiracy (Pet. App. A6) and separate trials because of the "severe prejudice" (J.A. A18) arising from a joint trial, plainly demonstrate that their interests have already diverged with respect to material legal, factual and tactical questions.

order here was amply justified by the court's responsibility to supervise the ethical practices of the attorneys appearing before it, and was well within its discretion under Fed. R. Crim. P. 44(c) to take "appropriate" measures in the absence of "good cause to believe no conflict of interest is likely to arise." [53]

The district court also did not err in refusing to permit Sprague & Rubenstone to represent any one of the petitioners once it had decided not to allow the firm to represent all four of them jointly.[54] It is well settled that an attorney is conclusively presumed to have had access to confidential information from a client that he formerly represented. See, *e.g.*, *United States* v. *Provenzano*, 620 F.2d 985, 1005 (3d. Cir.), cert. denied, 449 U.S. 899 (1980); *Arkansas* v. *Dean Foods Products Co.*, 605 F.2d 380, 384-385 (8th Cir. 1979); *United States* v. *Kitchin*, 592 F.2d at 904;

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[53] Petitioners argue that Fed. R. Crim. P. 44(c) does not contemplate a disqualification order (Pet. Br. 33-38). Rule 44(c), however, plainly grants the district courts wide discretion in dealing with joint representation questions. As the Advisory Committee Note points out, the rule "does not specify what particular measures must be taken to protect a defendant's right to counsel," but rather leaves such questions "within the court's discretion" because "the measures which will best protect each defendant's right to counsel may well vary from case to case" (77 F.R.D. at 600-601). The Advisory Committee Note also states that the discretion permitted under Rule 44(c) extends to entry of a disqualification order—even if the defendant expresses a desire to retain a particular attorney—where such a course of action is required to protect the interests of the individual defendant and the interest of the court in policing the ethical conduct of the bar. 77 F.R.D. at 600-603.

[54] Counsel for petitioners at one point even conceded that "'logic mandates'" disqualification of the firm of Sprague & Rubenstone as to any petitioner "should separate counsel be ordered" (Pet. App. A16).

Westinghouse Electric Corp. v. *Gulf Oil Corp.*, 588 F.2d 221, 224 & n.3 (7th Cir. 1978); *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128, 134-135 (2d Cir. 1976); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973); *T.C. & Theatre Corp.* v. *Warner Brothers Pictures*, 113 F. Supp. 265, 268-269 (S.D. N.Y. 1953) (Weinfeld, J.). The presumption is necessary to protect the basic confidential nature of attorney-client relationships, for any inquiry into whether confidential information has in fact been conveyed by a client to his former lawyer would itself destroy the confidentiality that Canon 4 of the Model Code of Professional Responsibility protects. See, *e.g.*, *Westinghouse Electric Corp.*, *supra*; *NCK Organization Ltd.*, *supra*; *Emle Industries, Inc.*, *supra*; *T.C. & Theatre Corp.*, *supra*.

Because Sprague & Rubenstone has formerly represented all four of the petitioners, the firm would be in a position to use confidential information to the detriment of three of the petitioners if permitted to continue in its representation of one of them. For example, if one petitioner formerly represented by Sprague & Rubenstone were to take the stand and testify adversely to the petitioner still represented by that firm, the firm would be in a position to use confidential information in cross-examining the witness. That would be unfair to the former client and would violate Canon 4 of the Model Code of Professional Responsibility (1980).[55] Accordingly, the district

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[55] Disqualification of the entire firm, however, does not deny the individual petitioners the benefit of any possible background expertise Sprague & Rubenstone may have acquired during its joint representation. See Pet. Br. 6. The firm has an ethical obligation to cooperate fully with petitioners' separate counsel, and is duty bound to provide such counsel with all nonconfidential papers and factual data relevant to each peti-

court's order disqualifying Sprague & Rubenstone from representing all four petitioners was neither arbitrary nor an abuse of discretion under Fed. R. Crim. P. 44(c).[56]

3. Petitioners claim (Br. 9) that, notwithstanding their divergent personal interests, they have a right to choose to forgo separate paths and present a common defense. We do not disagree. But the decision below does not abridge petitioners' right to present a common defense.[57] Rather, in requiring them to obtain separate counsel, it simply assures that any deci-

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tioner's defense. See Model Code of Professional Responsibility EC 2-32 (1980).

[56] Petitioners assert (Pet. Br. i) that the court of appeals utilized an unduly deferential standard of review in affirming the district court's order in this case. That argument is unpersuasive. Because of the broad discretion granted the district courts under Rule 44(c), as well as their superior vantage point for assessing the potential for conflicts of interest in particular cases, an exacting standard of review would be inappropriate. This is especially so if, as we argue, the right at issue is simply to be free from arbitrary or unreasonable disqualifications. In any event, the court of appeals did not, in fact, test the district court's disqualification order under an "abuse of discretion" standard; the court specifically stated that it would reverse the district court if it found "that there is good cause to believe that no conflict of interest is likely to arise" (Pet. App. A5-A6). The only facet of the district court's order that was tested under an abuse of discretion standard was the trial court's decision to prevent Sprague & Rubenstone from representing any of the petitioners (*id.* at A11).

[57] See *Ford* v. *United States*, 379 F.2d 123, 126 (D.C. Cir. 1967) (separate counsel must initially be appointed for indigent co-defendants in every case; if, after fully investigating the case, counsel conclude that both the interests of justice and the interests of the clients will be served by joint representation, it may be allowed).

sion to present a common defense is at least reached in light of advice from conflict-free counsel.[58]

Petitioners further assert (Br. 23-33) that since their right to assistance of counsel may be waived entirely, they may effectively waive their right to conflict-free counsel.[59] That argument, however, misconceives the nature of the issue before the Court.

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[58] The necessity for separate counsel prior to the presentation of a common defense is especially great in cases, such as this one, where the defendants' legal fees are being paid by a third party. As the Court has already recognized, the fee-paying third party may have objectives that diverge substantially from the interests of the defendants, creating unacceptable risks for the defendants themselves. *Wood* v. *Georgia*, *supra*. Indeed, the Fraternal Order of Police, which is defraying petitioners' legal fees in this litigation, has reportedly adopted the policy, in other unrelated criminal litigation, of withdrawing legal assistance from any officer who "agrees to testify against other officers in hopes of receiving a reduced sentence." Philadelphia Daily News, Mar. 23, 1983, at 15, col. 1.

[59] The courts of appeals are divided on the question whether defendants are absolutely entitled to be represented by a single attorney if they waive their right to conflict-free separate counsel. The Second, Fifth and Sixth Circuits hold that defendants have the power to designate a single lawyer to represent them by virtue of such a waiver. See *United States* v. *Curcio*, 680 F.2d 881, 885-888 (2d Cir. 1982); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975), *United States* v. *Garcia*, 517 F.2d 272, 275-278 (5th Cir. 1975); *United States* v. *Reese*, 699 F.2d 803, 805 (6th Cir 1983). The Third and Eleventh Circuits have held that defendants do not have the absolute right to waive their right to conflict-free counsel. *United States* v. *Dolan*, 570 F.2d at 1184; *United States* v. *Hobson*, 672 F.2d at 829.

The question is not whether petitioners can waive the right to conflict-free counsel, but rather whether they can insist on conflict-ridden counsel. The waiver of petitioners' right to conflict-free counsel has very little relevance to this inquiry.[20] In fact, in *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965), the Court concluded that a defendant's ability to waive a broad range of Sixth Amendment rights did not bestow upon him the converse of those rights,[21] and there is no reason to accord petitioners' asserted right to counsel of choice, which they base on the Sixth Amendment, any differing treatment.

The fact, therefore, that petitioners may have waived their rights to independent counsel not burdened with conflicts of interest does not end the matter. Although petitioners can waive their rights to separate counsel, the Constitution does not entitle

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[20] In *Faretta*, for example, the Court was careful to point out that the right of self-representation did not exist because it was possible to waive the right to the assistance of counsel, but rather because that right had an independent constitutional basis. 422 U.S. at 819-820 & n.15.

[21] Singer argued that, because he had the ability to waive his Sixth Amendment right to a jury trial, he therefore could insist on a trial without a jury. Although the Court recognized that a defendant can waive his right to trial by jury, it concluded that a defendant's waiver did not require the court and the government to accept his choice of a bench trial. The *Singer* Court also pointed out that an accused has no absolute right to compel a private trial, even though he has a right to a public trial (see *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980)), nor can an accused compel transfer of his trial to a district in which the crime was not committed, even though he has a right to trial where the crime was committed. 380 U.S. at 35. Finally, an accused cannot compel the government to try his case by stipulation, even though he has a right to confront the witnesses against him. *Ibid.*

them to insist on joint legal representation that does not meet established standards of ethical professional conduct. As detailed at some length above (pages 41-47, *supra*), petitioners' claimed right to counsel of choice cannot be absolute, and petitioners' waiver argument masks but does not alter that undeniable fact. By "waiving" their rights to separate counsel, petitioners cannot annul the strong and independent public interest in the fairness of criminal trials and the integrity of the legal profession. "The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982).

Petitioner's waiver argument, moreover, is fraught with difficulties for the fair and efficient administration of the criminal justice system. It is inherently difficult to determine whether a lay defendant has intelligently and knowingly waived any objections to conflicts of interest that may arise in the later course of criminal proceedings. See, *e.g.*, *United States* v. *Elrod*, No. 82-2063 (7th Cir. Aug. 19, 1983), slip op. 10. Because of the trial court's limited knowledge of the facts of a particular case before trial, as well as the court's inability to delve into attorney-client confidences, the district court is not in a position to educate fully the defendant regarding the possible conflicts that could arise from a particular joint representation. Geer, 62 Minn. L. Rev. at 141-142. Nor can conflict-ridden counsel be relied upon to obtain an informed waiver. *Id.* at 145; Rule 44(c) Advisory Committee Note, 77 F.R.D. at 596. In any event, it is quite likely that a lay defendant will fail to appreciate how the broad array of potential conflicts growing out of joint representation will injure his defense.

Of necessity, he is to some extent buying a pig in a poke.

Accordingly, as the reported cases demonstrate, a finding of intelligent and knowing waiver of the right to conflict-free counsel is almost tailor-made for post-conviction attack. See, *e.g.*, *United States* v. *Elrod*, *supra*; *United States* v. *Vowteras*, 500 F.2d 1210, 1211 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); Rule 44(c) Advisory Committee Note, 77 F.R.D. at 594. See also cases cited at notes 34, 44, 59, *supra*. Permitting district courts to disqualify defense counsel in the circumstances of this case, therefore, not only enforces the ethical standards of the legal profession, but furthers society's interests in the speedy and final determination of criminal cases as well. For by disqualifying counsel when there is a substantial potential for a conflict of interest, there will be no need for subsequent litigation focusing on the validity of the defendant's waiver of his right to conflict-free counsel and related due process claims. See *United States* v. *Dolan*, 570 F.2d at 1184; *United States* v. *Mari*, 526 F.2d 117, 119-121 (2d Cir. 1975) (Oakes, J., concurring). See generally Rule 44(c) Advisory Committee Note, 77 F.R.D. at 596-597.[42]

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[42] We are disturbed by the implication in some cases that defendants retain the ability to attack their convictions on the ground that their counsel labored under conflicting interests even where they had *validly* waived their right to conflict-free counsel. See, *e.g.*, *United States* v. *Elrod*, slip op. 10 (although court finds that habeas corpus petitioner knowingly waived his right to separate counsel, it refuses to foreclose possibility that petitioner's attorney "acted incompetently in deciding to represent the petitioner and his co-defendants" despite the waiver); *United States* v. *Vowteras*, 500 F.2d at 1211, (the defendants having been "fully advised of the facts underlying

The criminal process is not merely a contest between the government and the accused. The criminal justice system also serves as "an outlet for community concern, hostility, and emotion." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571 (1980) (opinion of Burger, C.J.). That outlet for community concern and emotion, furthermore, is more than simply a channel for vengeance. Rather, to a people proud of its traditional freedoms, the criminal process is also a daily demonstration of the fairness of our law. It is for that important reason that our criminal process must "satisfy the appearance of justice." *Offutt* v. *Unied States*, 348 U.S. 11, 14 (1954). See *Richmond Newspapers, Inc.*, 448 U.S. at 571-572 (opinion of Burger, C.J.); *id.* at 593-594 (opinion of Brennan, J.); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 427-429 (1979) (Blackmun, J., dissenting).

Accordingly, it is not up to the defendant in a criminal trial to vitiate the fairness of that proceeding by deciding for himself to employ counsel ren-

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the potential conflict * * * cannot now repudiate their choice [of joint representation] in the absence of a credible showing of 'some specific instance of prejudice, some real conflict of interest, resulting from a joint representation * * *' "). See also *Cuyler* v. *Sullivan*, 446 U.S. at 353 (opinion of Brennan, J.); *id.* at 354 n.1 (opinion of Marshall, J.). In the government's view, it should be firmly established that, if a defendant has effectively waived his right to conflict-free counsel under the standards of *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), he is forever barred from raising ineffective assistance of counsel claims based on the conflicting interests of counsel. See, *e.g.*, Pet. App. A9 ("A truly knowing and intelligent waiver accepted by the court will insulate a conviction from later attacks"). But, to the extent that a valid waiver is not to be construed as genuinely final, there is all the more reason to recognize the power of the district court to require separate counsel in cases in which there is a demonstrable likelihood that the representation will be infected by a conflict of interest.

dered ineffective by conflicts of interest, for an unjust conviction not only injures the defendant but is inimical to the community's trust in the integrity of its courts.[63] The stated goal of the criminal process is to "provide for the just determination of every criminal proceeding" (Fed. R. Crim. P. 2), and the fulfillment of that goal requires more than simply according substantial deference to a defendant's expressed desire to retain a particular attorney. It requires as well that the public's "interest in having criminal prosecutions decided on truthful and complete records" be given full recognition, even though that interest "does not necessarily coincide with that of the accused." *Gannett Co.* v. *DePasquale*, 443 U.S. at 428 (Blackmun, J., dissenting).[64] In short, that a defendant has the right to a fair trial does not mean he has the right to insist upon an unfair trial.[65]

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[63] See Geer, 62 Minn. L. Rev. at 155-157; Comment, 68 J. Crim. L. & Criminology at 251; *Developments*, 94 Harv. L. Rev. at 1394.

[64] Cf. Fed. R. Crim. P. 11(f), which requires that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Thus, it is not up to the defendant to determine that he shall be convicted in circumstances falling below certain minimum standards insisted upon by society.

[65] A defendant's willingness to accept an unfair trial is not as farfetched as it sounds. A less culpable defendant may be willing to forego efforts to protect his own rights in order to help a more culpable co-defendant, who may be a friend or family member. Geer, 62 Minn. L. Rev. at 145. Worse, he may do so to forestall retaliation from a more powerful co-defendant.

CONCLUSION

The judgment of the court of appeals should be vacated for lack of jurisdiction, with instructions to dismiss the appeal. In the alternative, the judgment should be affirmed.

Respectfully submitted.

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